

**Editor's note: Appealed -- aff'd, Civ.No. 79-1771 (D.Colo. Jan. 20, 1981), 506 F.Supp. 1204; aff'd, No. 81-1315 (10th Cir. Sept. 21, 1983); 717 F.2d 1316; cert. denied, 104 S.Ct. 2169, 466 US 958 (April 30, 1984)**

CELESTE C. GRYNBERG  
DEAN G. SMERNOFF

IBLA 78-420

Decided November 30, 1979

Appeal from the decision of the Montrose Team Branch of Adjudication, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer C-26446.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings

When, in a drawing of simultaneously filed noncompetitive oil and gas lease offers, an offer is filed by a parent as cotrustee on behalf of a minor child, and another offer for the same land is filed by the parent individually, under 43 CFR 3100.0-5(b) the parent has an interest in the child's offer where trust proceeds may be used for support of the child, and the offers must be rejected. 43 CFR 3112.5-2.

2. Oil and Gas Leases: Applications: Drawings

Where a cotrustee files individually in a simultaneous filing of oil and gas lease offers for the same parcel on which she files as cotrustee for the trust, both offers must be rejected under the regulation which prohibits the filing of multiple offers. 43 CFR 3112.5-2.

APPEARANCES: Philip G. Dufford, Esq., Welborn, Dufford, Cook, and Brown, Denver, Colorado, for appellant; Harold J. Baer, Jr., Esq., Office of the Regional Solicitor, Denver, Colorado, for the appellee, Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE GOSS

Celeste Grynberg and Dean Smernoff, as cotrustees of the Stephen Mark Trust, appealed from the May 8, 1978, decision of the Bureau of Land Management (BLM), Montrose Team Branch of Adjudication, which rejected the trust's noncompetitive oil and gas lease offer CO-167.

The Stephen Mark Trust was established on August 1, 1969, by Jack Grynberg, for his son Stephen Mark Grynberg. This was one of three irrevocable discretionary support trusts created by the same settlor for his three children in a single trust instrument. Each trust is subject to all the terms outlined in this document. All three trusts are managed by cotrustees Celeste Grynberg and Dean Smernoff.

In the February 1978 drawing, held March 13, 1978, the drawing entry card (DEC) for the Stephen Mark Trust received first priority. Both of Stephen's parents, Jack Grynberg and cotrustee Celeste Grynberg, also filed DEC's for CO-167. In addition, DEC's were submitted by the same cotrustees for Stephen's siblings' companion trusts, the Rachel Susan Trust and the Miriam Lela Trust. BLM rejected all five offers as violative of the prohibition against multiple filing. 43 CFR 3112.5-2. BLM cited three reasons for its decision rejecting these offers as creating an unfairly enhanced mathematical advantage for the Grynbergs over other applicants for CO-167:

1. A parent of a trust beneficiary and that beneficiary's trust filed on the same parcel. This constitutes a multiple filing because the trusts are so drafted as to provide benefits either directly or indirectly to both the beneficiary and the parent should the trust receive a lease. This is the case because Articles VI and VIII of the Trust Agreement allow the trusts to pay necessary expenses of their children for which they are legally liable.
2. Where more than one trust competes for any one lease, an action prohibited under this regulation has occurred. This is so because, if the parents are relieved of any or all of their legally required expenses toward one child because of his trust's gaining of an oil and gas lease, they have more unobligated funds to spend on all of the children. Thus, each child-beneficiary and the parents benefit from any child's trust gaining a lease.
3. Whether a trustee files both individually and on behalf of the trust, a multiple filing exists because the trustee's fiduciary duty to the trust is such that were the trustee's individual filing to be successful, it would be held in a suit brought by a beneficiary of the trust that the trustee holds the lease in a fiduciary capacity

for the use and benefit of the trust. The situation here is analogous to that presented in McKay v. Wahlenmaier, 226 F.2d 35 (1955), in which the court found a fiduciary relationship between corporate officers and a corporation with respect to simultaneous oil and gas filings.

The appellants argue on appeal that 43 CFR 3112.5-2 contains no explicit prohibition on trustee filing; therefore, denial of the trusts winning lease offer was improper. They argue that the parents' legal obligation to support their children is undiminished by the trust, therefore no multiple filings problem exists. The trust agreement in Article IV, Distribution Provisions, expressly forbids distributions that would satisfy a legal obligation of the parents, thus the grantor's intent is clear. The trust provides:

Section 1. Income and Principal. The Trustee is hereby authorized in the sole discretion of the Trustee, at any time and from time to time, to distribute all or any part of the income and/or principal of each separate trust to the beneficiary of such trust, as the Trustee deems desirable for the best interests of said beneficiary, or to accumulate all or any part of such net income and add the same to the principal of such trust, to be held, administered and distributed as a part thereof; provided, however, that no distribution shall be made pursuant to this Section which would satisfy a legal obligation of the Grantor.

Appellants continue that although Article VI, Statement to Trustee, outlines specific support standards, the final sentence allows the language in Article IV to control.

The grantor further desires that the Trustee, in making any distributions, consider not merely the general economic requirements of the beneficiary but also the ability of said beneficiary to deal with and manage the monies or property involved. Accordingly, it is the Grantor's preference that distributions, if any, be made in installments rather than in a single sum, unless the Trustee in his sole discretion determines that a lump sum distribution is then in the best interests of a beneficiary.

It is the Grantor's wish that the term "best interests" of a beneficiary be liberally construed and include not only the possibility of distributions for the support, medical care and education (including professional education) of said beneficiary but also the possibility of distributions for his comfort, convenience and happiness. As illustrations, and not in limitation of the purposes

for which distributions can be made under such standard, the Trustee may make distributions or permit said beneficiary to travel for education or pleasure purposes or to permit said beneficiary to purchase a personal residence or to invest in a business.

This statement is intended solely as a guide to the Trustee and shall in no way be construed to alter, limit or enlarge the discretions and powers conferred upon the Trustee by any other provisions hereof.

Appellants add that although the trust instrument allows the trustee to distribute trust payments directly to the parents, this clause refers only to distributable funds. They assert that under Colorado law a minor's assets may not be used for support unless the parents cannot afford to support the child. Therefore, they reason, since the Grynbergs are sufficiently wealthy to support their children, there is no danger here of use of trust assets for support. They point out also that spouses are both allowed to file oil and gas lease applications without conflict.

Neither do appellants see any conflict between the several children's trusts. They again argue that the parents' support obligation is undiminished if one child's trust is successful.

BLM argues that if one child's trust is successful, funds for supporting the others will necessarily be freed. BLM claims that parents and siblings will benefit if family funds are freed this way. In addition, all siblings and parents are direct or potential beneficiaries because in Article V they would receive distributions upon the death of the trust beneficiary. BLM cites the common address and common cotrustees as indicative of a "common scheme or plan thus violating the regulation." 43 CFR 3112.5-2.

BLM also argues that Federal oil and gas lease filings constitute ventures so speculative that they are inappropriate trust investments. BLM concludes that the appellants violate the spirit of the multiple filings provision by trying, with trusts, to gain a greater than the allowed even chance to secure a lease. The regulation states:

§ 3112.5-2 Multiple filings.

When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [sic] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a

greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected.

The Department has held a wide variety of oil and gas lease interests sufficient to violate the multiple filings prohibition. June Oil and Gas, Inc., 41 IBLA 394, 86 I.D. 374 (1979); Farrell L. Lines, 40 IBLA 91 (1979); William R. Boehm, 36 IBLA 346 (1978); Panra Corporation, 27 IBLA 220 (1976); Richard Donelly, 11 IBLA 170 (1973); Schermerhorn Oil Corp., 72 I.D. 486 (1965). These cases illustrate the broad application of the multiple filing regulation in order to ensure an equal chance for each applicant in the drawing. The terms of the prohibition against multiple filings, expressed in 43 CFR 3112.5-2, are not restricted to those instances where applicants would have actual ownership.

Departmental regulation 43 CFR 3100.0-5(b) defines the term "interest" broadly:

(b) Sole party in interest.

\* \* \* \* \*

An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease. [Emphasis supplied.]

The trustee's extremely broad powers are outlined in Article VIII of the trust instrument. This article empowers the trustee(s):

(c) to continue to hold any or all property, real or personal, received by the Trustee from any person or fiduciary as a part of the trust estate or as an addition to the trust estate, even though the same be of a kind not usually considered suitable for trustees to select or hold, or be a larger proportion in one or more investments than the trust estate should, but for this provision, hold, including residential property, and irrespective or [sic] any risk, nonproductiveness, or lack of diversification \* \*

Trust Instrument VIII § 1.

In section 1(j), the trust instrument specifically contemplates oil and gas leasing. The appellants are correct in arguing that because the trust instrument contemplates this kind of investment, it is permissible. In addition, trust filing is specifically permitted by the current regulations. 43 CFR 3102.1-1(b); 43 CFR 3102.5; 43 CFR 3110.1-3(a). A trustee may properly file a simultaneous drawing entry card in the name of a trust for a minor. Margo Panos Trust, 28 IBLA 1 (1976). Therefore, we are not now concerned with the propriety of a trustee of a single trust filing an offer to lease.

The first issues to be resolved are whether the parents have any prospective advantage or benefit in increments, issues, or profits which may be derived from a lease won by the trust established for their minor child or whether the child would stand to accrue any benefit or advantage from profits derived from a lease won by his parents. Secondly, may a cotrustee file simultaneous lease offers both individually and on behalf of the trust without violating 43 CFR 3112.5-2, the prohibition against multiple filings?

Because the offers must be rejected for each of the two reasons set forth hereinbelow, it is not necessary to discuss whether the contingent remainders, which appellants state were subject to being eliminated by power of appointment, nevertheless gave rise to a prohibited multiple interest under 43 CFR 3100.0-5(b) and 3112.5-2.

[1] The trust instrument must be examined in order to ascertain the interests of this beneficiary, relative to his parents and to Celeste Grynberg as cotrustee. Article VI outlines the trust's support standards. These items, medical care and education, are direct parental obligations. Any payments must necessarily fulfill the parents' support obligation, to the parents' benefit. This purpose, mentioned specifically in the trust instrument, indicates one of the grantor's intentions when the trust was created. Trust terms must be construed consistently. The precatory, general language in Article IV could not be used to deny support to a child who is in want. To do so would be to negate the specific directions of the trust instrument. Appellants have admitted the possibility, albeit remote, that in a disastrous financial situation, they would use the children's trust assets for support. The trust instrument notes that such payments may be made directly to the child's guardian. There is benefit to the parents in the possibility of direct support payments for the child.

Thus, where the parents and one of the children's trusts file simultaneous offers for the same parcel, the success of either of them would be advantageous to the other. Because of violation of sections 3100.0-5(b) and 3112.5-2, the offers were properly rejected. Farrell L. Lines, supra.

[2] As to the cotrustee filing individually for the same parcel on which she filed for the trust, trustee must meet standards above those of the ordinary marketplace. Her duty of loyalty demands avoidance of any situation or transaction in which her personal and her fiduciary interests would conflict. As stated in Restatement (Second) of Trusts, § 170 p: "A trustee violates his duty to the beneficiary if he enters into a substantial competition with the interest of the beneficiary." Further, it has specifically been held that a trustee may not compete with his beneficiary in acquisition of property. Wootten v. Wootten, 151 F.2d 147, 150 (1945); 2 Scott on Trusts § 170.21 (3rd ed. 1967). Filing by the cotrustee individually and also on behalf of the trust created a prohibited multiple filing under 43 CFR 3112.5-2, requiring rejection of such offers. See McKay v. Wahlenmaier, supra, and BLM decision quoted, supra.

For the result herein, it is not necessary that the parents have conspired to evade the regulations. Multiple filings gave the parents and the trusts greater mathematical chances to benefit from the results of the drawings. An interest which an oil and gas lease applicant has in the offer of another applicant for the same land in a drawing of simultaneously filed noncompetitive lease offers, and which effectively gives the first applicant greater chances of success in the drawing, is inherently unfair whether or not there has been collusion or intent to deceive the Department. June Oil and Gas, Inc., supra; Richard Donelly, supra; Schermerhorn Oil Corp., supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

Judge Goss and Judge Fishman both emphasize in part the familial relationship between one of the cotrustees and the beneficiaries of the various trusts. The cotrustee in her own right and as trustee for these 3 trusts filed offers in the same drawing. This Board has not yet ruled, as Judge Fishman's position seems to be, that minor children, through their appropriate guardian or trustee, and their parents may all participate in a drawing without violating the prohibition against multiple filings, even where the guardian or trustee is a parent. See Charles J. King, 40 IBLA 276 (1979). However, the implication in Farrell L. Lines, Trustee, 40 IBLA 91 (1979), and Judge Goss's opinion seems to be that because parents have obligations under the law to support minor children, children would have an interest in their parents offer. I believe this position should be examined by this Department.

Nevertheless, I do not believe we need to decide the issue in this case because the matter need not rest on the family relationship, but should rest upon the legal obligations and rights created by the trust instrument. Under that interest the beneficiaries of the trust and the presently designated cotrustee, Celeste C. Grynberg, all have contingent remainder interests. I believe this is a sufficient interest in the lease offer and lease as the word "interest" is defined by 43 CFR 3100.0-5(b) to include "any claim or any prospective or future claim to an advantage or benefit from a lease." Accordingly, I would rest the decision upon a finding that there was a multiple filing by a cotrustee for herself and for trusts where beneficiaries and the cotrustee have an interest in the offer of each other under the trust. Also, I agree with Judge Goss on the fiduciary issue.

Joan B. Thompson  
Administrative Judge



## ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The main opinion essentially ignores the language of section 1 of the trust agreement "that no distribution shall be made pursuant to this section which would satisfy a legal obligation of the Grantor."

While presumably this language is intended to protect the corpus and income of the trust from grantor's creditors, it also has the effect of precluding the grantor from utilizing those funds for another legal obligation, i.e., the duty to support his children.

Article VI of the trust agreement referred to in the main opinion as vitiating that provision by stating that "medical care and education (including professional education)" are cognizable uses is nevertheless without that effect. Those provisions in Article VI are limited by the following therein: "This statement is intended solely as a guide to the Trustee and shall in no way be construed to alter, limit or enlarge the discretions and powers conferred upon the Trustee by any other provisions thereof." Thus the trustee is still bound not to spend money for those items for which a parent is required to expend for a minor child.

The majority blithely quotes the Restatement, Trusts, § 170p. "A trustee violates his duty to the beneficiary if he enters into a "substantial competition with the interest of the beneficiary." (Emphasis supplied.) It is not entirely clear that filing a DEC (drawing entry card) where thousands may be filed is "substantial competition."

Moreover, the effect of the decision is to discriminate against children, in essence favoring spouses, as explained infra.

The Department has permitted husbands and wives to file DEC's for the same tract, even in community property States. Cf. the casuistry employed in Duncan Miller, 71 I.D. 121 (1964). Such holdings by husbands and wives in such states have been treated as discrete for all purposes under the mineral leasing laws. See Solicitor's Opinion, 644 I.D. 44 (1957). Under the laws of virtually every State, a husband has the solemn obligation to support his wife. Thus in construing the oil and gas regulations, the Department finds possible support of wives no barrier, but support of children a preclusive factor. I submit this inconsistency renders the holding in the majority opinion arbitrary and capricious in that the definition of "sole party in interest," set out in 43 CFR 3100.0-5(b) is given a discrete construction when the person holding the other interest is a spouse, and not a minor child.

I would reverse the decision below.

Frederick Fishman  
Administrative Judge

